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IN THE

Supreme Court of the United States

October Term, 1947

THE UNITED STATES OF AMERICA,
Appellant,

v.

SOUTH BUFFALO RAILWAY COMPANY,
BETHLEHEM STEEL COMPANY, and
BETHLEHEM STEEL CORPORATION

Appeal from the District Court of the United States for the Western District of New York

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BRIEF AMICUS CURIAE FOR THE AMERICAN SHORT LINE RAILROAD ASSOCIATION

Part I—ARGUMENT

Part II is History of Commodities Clause

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February 2, 1948

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

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PART I—ARGUMENT

I

PRELIMINARY STATEMENT

The American Short Line Railroad Association is a voluntary non-profit association of 300 railroads, operating approximately 16,000 miles of railroad in the United States. More than 100 of them are industrially-owned common carriers, performing either road-haul or terminal switching services, or both.

This proceeding is of particular importance to the members of this Association by reason of the fact that one of the issues presented is whether *United States v. Elgin, Joliet and Eastern Ry. Co.*, 298 U. S. 492, 56 Sup. Ct. Rep. 841, 80 L. ed. 1300 (1936) is controlling (R. 925).

The parties to this proceeding have consented to the filing of this Brief *Amicus Curiae*. The Solicitor General consents to the filing of the brief, Parts I and II, on condition that we advise the Court that it is the Government's position that Part II does not contain a complete statement of the legislative history of the Commodities Clause (see Government's brief pp. 109-113).[1]

[1] But, see pages 72-80 of Legislative History.

II

SUMMARY OF ARGUMENT

This Association respectfully submits that:

1. A common carrier by railroad operating a terminal switching line located wholly within the confines of a single State cannot violate the Commodities Clause (Section 1(8) of Interstate Commerce Act, U. S. C. Title 49, Section 1(8)) because it cannot transport a commodity from a point in one State to a point in another State.

2. The Commodities Clause does not, in purpose, language, or effect, prohibit, *ipso facto*, a railroad subsidiary of a holding company from transporting commodities manufactured by a producing subsidiary of that holding company.

3. Congress has repeatedly and consistently refused to amend the Commodities Clause so as to prohibit, *ipso facto*, a railroad subsidiary of a holding company from transporting commodities manufactured by a producing subsidiary of that holding company.

III

ARGUMENT

Point 1.

A Carrier Whose Line of Railroad Is Located Wholly Within a Single State Cannot Violate the Commodities Clause Because It Cannot Transport a Commodity from a Point in One State to a Point in Another State.

The Commodities Clause, by its own terms, makes it unlawful for any railroad company to transport *from any State to any other State* any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

For the ready convenience of the Court, there is submitted herewith, as Part II of this brief, a "Legislative and Judicial History of the Commodities Clause."

That Legislative History clearly demonstrates the intent of the Congress to limit the prohibitions of the Commodities Clause to railroads which cross State lines. This is shown by reference to page 73 of this History. There it is stated that when Senator Elkins proposed the amendment which became the Commodities Clause as a substitute for an earlier amendment he had offered, *Senator Bacon immediately called attention to the fact that the new amendment being proposed would have no effect so long as the transportation was wholly within the confines of a single State.* After Senator Bacon had so clearly pointed this out, the amendment was agreed to. 40 Congressional Record 6568-6570 (1906). The prohibitions of the Commodities Clause are limited to interstate trans-

portation, and not in interstate commerce. In other words, a carrier located wholly within the confines of a single State, engaged in interstate commerce, may transport such articles in *interstate commerce* so long as it does not transport them in interstate *transportation*, i.e., across State lines.

Point 2.

The Commodities Clause Does not, in Purpose, Language, or Effect, Prohibit, ipso facto, a Railroad Subsidiary of a Holding Company from Transporting Commodities Manufactured by a Producing Subsidiary of That Holding Company.

To sustain the proposition that a railroad subsidiary of a holding company violates the Commodities Clause when it transports commodities produced by a producing subsidiary of that holding company, the court must overrule *United States v. Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 56 Sup. Ct. Rep. 841, 80 L. ed. 1300 (1936), and found in the History at pages 283-299, wherein *United States v. Reading Company*, 253 U. S. 26, 40 Sup. Ct. Rep. 425, 64 L. ed. 760 (1920), found in History at pages 234-264, was distinguished.

In addition, the Court would be obliged to find and hold that the ownership by a holding company of a railroad subsidiary and a producing subsidiary, *ipso facto*, as a matter of law,—

1. Makes the railroad subsidiary the manufacturer, miner or producer of the commodities manufactured, mined or produced by the producing subsidiary; or

2. Makes the railroad subsidiary the owner, in whole or in part, of the commodities manufactured, mined or produced by the producing subsidiary; or

3. Gives the railroad subsidiary an interest, either direct or indirect, in the commodities manufactured, mined or produced by the producing subsidiary.

We believe that this issue was settled, as to each and all of the three points listed above, by *United States v. Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 56 Sup. Ct. Rep. 841, 80 L. ed. 1300 (1936). We believe that case very properly distinguished *United States v. Reading Company*, 253 U. S. 26, 40 Sup. Ct. Rep. 425, 64 L. ed. 760 (1920), because it was primarily a case under the Anti-Trust Laws, with the Commodities Clause only incidentally involved. It was only by virtue of the Anti-Trust Laws that the court found any authority for the decree there entered. The *Reading Case*, as we view it, did not hold that, *as a matter of law*, the ownership by a holding company of the stock of a railroad company and of the stock of a coal company was *ipso facto* a violation of the Commodities Clause.

Prior to the *Reading Case*, this Court had held that in order that there be a violation of the Commodities Clause the railroad must have an interest, legal or equitable, in the commodity transported, and that the mere ownership of the stock of a producing company does not give it such an interest, *United States v. Delaware and Hudson Company*, 213 U. S. 366, 29 Sup. Ct. Rep. 527, 53 L. ed. 836 (1909), and had further approved that principle in *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 31 Sup. Ct. Rep. 387, 55 L. ed. 488 (1911), and, again, in *United States v. Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516, 35 Sup. Ct. Rep. 873, 59 L. ed. 1438 (1915). In these cases it was held that violations of the Commodities Clause were brought about only because the transportation companies and the producing companies were so inseparably operated as to be indistinguishable in fact.

Since, *as a matter of law*, the mere ownership by a holding company and a producing company does not result in a violation of the Commodities Clause where the railroad company transports the commodities of the producing company, there can be a violation of the Commodities Clause only where it is shown that there is such a domina-

tion by the holding company of the affairs of the railroad company and of the producing company that these companies are not separately and independently operated. That issue is left for discussion by the appellees. However, we would call attention to the proposition that form alone cannot bring a case within the prohibitions of a statute when in fact it is not within its terms. This was well illustrated by Mr. Justice Holmes, speaking for this Court in *Bullen v. Wisconsin*, 240 U. S. 625-630, 631, 36 Sup. Ct. 473, 60 L. ed. 830 (1916), when he said:

> "When the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits."

Having in mind that the primary evil aimed at by the Commodities Clause, as disclosed by its history, was the ownership of coal mines by railroads which transported the coal from these mines via their own roads with resulting discriminations against independently-owned mines, it will readily be seen that none of the evils aimed at by the Congress are shown, by the record in this case, to be in existence. Since the evils aimed at do not exist, there would seem to be no basis for the application of the Commodities Clause to the facts as developed by the record in this case. In the absence of such evils, no remedy is necessary.

Point 3.

Congress Has Repeatedly and Consistently Refused to Amend the Commodities Clause so as to prohibit, *ipso facto*, a Railroad Subsidiary of a Holding Company from Transporting Commodities Manufactured by a Producing Subsidiary of That Holding Company.

There have been many proposals for the amendment of the Commodities Clause since its enactment in 1906. These proposals are dealt with fully in the History of the Commodities Clause, at pages 92-126.

From that Legislative History it will readily be noted that Congress has consistently rejected proposals for the amendment of the Commodities Clause which would accomplish the purpose sought by the United States in the instant proceeding. In the *Elgin, Joliet & Eastern Case, supra*, this Court refused to legislate where the Congress had not. It is respectfully suggested that the forum for obtaining a change in the statute has been mistakenly chosen, and that this Court should remit the Appellant to its right to seek an amendment of the statute by the Congress.

IV

CONCLUSION

It is respectfully submitted that the judgment of the United States District Court for the Western District of New York should be affirmed.

Respectfully submitted,

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